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Supreme Court of the United States

OCTOBER TERM, 1935. No. 13.

BECKER STEEL COMPANY OF AMERICA,
Petitioner,

against

HOMER S. CUMMINGS, Attorney General of the United States, in his official capacity as Alien Property Custodian, and WILLIAM A. JULIAN, as Treasurer of the United States,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER

TOWNSEND & KINDLEBERGER,
Solicitors for Petitioner.

E. CROSBY KINDLEBERGER,
Of Counsel.

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Supreme Court of the United States

OCTOBER TERM, 1935. No. 13.

BECKER STEEL COMPANY OF AMERICA,
Petitioner,

against

HOMER S. CUMMINGS, Attorney General of the United States, in his official capacity as Alien Property Custodian, and WILLIAM A. JULIAN, as Treasurer of the United States,
Respondents.

BRIEF FOR PETITIONER.

This Court on April 29, 1935 (294 U. S. ; 55 S. C. 657; R. 19), granted a writ of certiorari to review the decision of the Circuit Court of Appeals, Second Circuit (75 Fed. 2d 1005), affirming on the opinion rendered by Circuit Judge Julian W. Mack (10 Fed. Supp. 343; R. 13-15) the decision of the United States District Court, Southern District of New York, which dismissed, for want of jurisdiction, suit brought by the petitioner against the respondents. (R. 13).

Jurisdiction.

The jurisdiction of this Honorable Court is invoked under the Judicial Code Sec. 240, as amended by the Act of February 13, 1925, Chap. 229, Sec. 1; 43 Stat. 938; 28 U. S. C. A., Sec. 347 (a).

The Single Question Presented.

On this short record, involving a small amount of money, is presented an important question of the construction of Section 9 (a) of the Trading With the Enemy Act (Act of October 6, 1917, Chap. 106; 40 Stat. 411).

Section 9 (a) of the Act gives the remedy of suit to an American owner whose property has been mistakenly and wrongfully seized and held by the Alien Property Custodian or the Treasurer of the United States.

The question is should this remedy be construed to require a mere return of *a portion* of the net proceeds of the wrongful sale, and a loss of almost one-quarter of the net proceeds of the wrongful sale paid out to third persons; or do the statute and the Fifth Amendment require the return to the American owner of all the principal of his property or its proceeds?

A strained meaning of the words "held by the Alien Property Custodian" was adopted by Judge Mack in the Courts below (10 Fed. Supp. 343; R. 15), while the petitioner claims that Section 9 (a) must be construed liberally, and that the construction put upon it by the courts below would make it unconstitutional, as depriving an American citizen of his property without due process of law, under the Fifth Amendment. Petitioner further claims that the statute was not intended to require a *time race* between the Alien Property Custodian and the American owner of property, by which one American citizen might lose all or part of his property if the Alien Property Custodian was quick enough to sell his property before he could consult counsel and bring a suit for its recovery, while some other citizen, similarly situated, who had alert counsel under retainer, and acted before the Alien Property Custodian could ap-

prove any voucher payments, would be able to recover all of his property. The petitioner further claims that the reasoning of this Court in *Escher* v. *Woods*, 281 U. S. 379, demands that the American owner, in every case of wrongful seizure of his property, should receive full and complete relief, under Section 9 (a) of the Act, and be put in the same position as if the seizure had never taken place, just as is the case where the Government seizes other property of American owners under power of eminent domain.

Finally, petitioner claims that the Alien Property Custodian, when making the sale of its stock, acted as a *quasi* trustee, and should not be permitted to charge the American owner with expenses solely incurred by him in the wrongful sale of the American's stock.

Statute Involved.

In addition to the Fifth Amendment of the Constitution of the United States, this case involves the construction of Section 9-a of the Trading With the Enemy Act, which reads as follows:

> "Section 9. *Claims to property transferred to custodian; notice of claim; filing; return of property; suits to recover.* (a) Any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, or to whom any debt may be owing from an enemy or ally of enemy whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him

hereunder and held by him or by the Treasurer of the United States may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States, or of the interest therein to which the President shall determine said claimant is entitled: *Provided,* That no such order by the President shall bar any person from the prosecution of any suit at law or in equity against the claimant to establish any right, title, or interest which he may have in such money or other property. If the President shall not so order within sixty days after the filing of such application or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may institute a suit in equity in the Supreme Court of the District of Columbia or in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the court shall determine said claimant is entitled. If suit shall be so instituted, then such money or property shall be retained in the cus-

tody of the Alien Property Custodian, or in the Treasury of the United States, as provided in this Act, and until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied by payment or conveyance, transfer, assignment, or delivery by the defendant, or by the Alien Property Custodian, or Treasurer of the United States on order of the court, or until final judgment or decree shall be entered against the claimant or suit otherwise terminated." (Act of Oct. 6, 1917, chap. 106, 40 Stat. 411.)

The Facts.

The courts below have held that on the facts stated in the bill of complaint, which are admitted on the motion of respondents to dismiss (*Russian Volunteer Fleet* v. *United States,* 282 U. S. 481, 489), the proper construction of Section 9 (a) of the Trading With the Enemy Act gave no jurisdiction to the District Court to render a decree for the complainant-petitioner. The courts below, without considering the merits, denied a decree which petitioner sought, requiring the Attorney General, as the Acting Alien Property Custodian, or the Treasurer of the United States, to pay and deliver to the petitioner the sum of $3,887.84, which it alleges had first been collected from the wrongful sale of the petitioner's property and afterwards paid out to third persons for fees and charges not connected with the protection of the trust or its administration, and solely occasioned by the wrongful sale of stock of petitioner, an American corporation, which had been adjudicated not to have been *"enemy-owned"*.

The bill of complaint, after referring to the complainant having been a West Virginia corporation (R. 2), and

that the respondents were Acting Alien Property Custodian and Treasurer of the United States, respectively (R. 3), and that the suit was brought under the Trading With the Enemy Act (R. 3), alleges that on February 9, 1917, A. Mitchell Palmer, then Alien Property Custodian, seized 5,000 shares of stock belonging to the petitioner, as being enemy-owned, and caused them to be reissued to himself (R. 3-4); that 2,500 shares of this stock were ordered returned to the petitioner by the United States District Court for the Southern District of West Virginia (R. 4), and that the remaining 2,500 shares seized by the Alien Property Custodian were sold by him on February 20, 1919, for the sum of $20,000; which sum was received and turned over by him to the then Treasurer of the United States (R. 4); that these shares so sold belonged to the petitioner as its sole property, and were unlawfully seized, and converted and sold, by said Palmer, as Alien Property Custodian, and were of the full value of $20,000, and that the proceeds of said sale and interest thereon at all times belonged to the complainant-petitioner (R. 4).

In paragraph Eleventh of the complaint it is alleged that from the $20,000 proceeds of said sale of said stock unlawfully sold, the then Alien Property Custodian, without knowledge or consent of the complainant, paid out from the *principal* of the fund so received to third persons named in the bill of complaint eleven specified items, aggregating $3,887.84—

> "that all of said payments were for advertising and printing of a catalog of the unlawful sale of said stock; for legal services in connection with said unlawful sale, and for other expenses directly due to the making of said sale" (Par. Eleventh, R. 5).

The Twelfth paragraph of the bill alleged that these unlawful payments by the Alien Property Custodian and the Treasurer of the United States were made from the principal amount received on the unlawful and improper sale of the stock, and not from the income or other property of the complainant; and that none of the payments made to third persons, were in connection with the preservation of the property or its care—

> "and none of them could properly have been incurred, if said 2,500 shares of stock had not been improperly and illegally sold, as hereinbefore set forth" (Par. Twelfth, R. 5).

The making of the claim for $20,000, the proceeds of the unlawful sale of the complainant's stock under Section 9 (a) of the Trading With the Enemy Act was alleged (Par. Thirteenth); the bringing of suit under Section 9 and its trial in Par. Fourteenth (R. 5-6); the decree made by U. S. District Judge Augustus N. Hand, dated August 21, 1925, adjudged the sale illegal, because the stock belonged to the complainant, a West Virginia corporation, and

> "was not subject to seizure and sale as the property of an enemy alien";

and directing that the $20,000 be returned (R. 6).

Subsequent paragraphs of the bill refer to complainant's attempt to collect the $20,000 due it; the refusal of the Government officials to pay the entire amount; $16,112.16 being all the money claimed to have remained in the alleged trust (Par. Sixteenth, R. 7); the circumstances of the payment of the $1,112.16 and the claim by complainant that such circumstances constituted duress in law (Pars. Seventeenth, Eighteenth and Nineteenth; R. 7).

Then follow allegations of the subsequent claim by complainant for interest under authority of *Henkels* v. *Sutherland,* 271 U. S. 298 (Pars. Twentieth—Twenty-second, R. 8); the decision of this Court in *Escher* v. *Woods,* 281 U. S. 379 (Par. Twenty-third, R. 8 and 9); previous attempts to secure payment of the $3,887.84; and denial of relief on the ground that the suit had abated (Pars. Twenty-fourth to Twenty-ninth, R. 9-10); the decision of this Court in *Fix* v. *Philadelphia Barge Co.,* 290 U. S. 530 (R. 10); the resubmission of the claim to the Attorney General of the United States in February 1934, and his refusal to make payment (Pars. Thirtieth and Thirty-first, R. 10 and 11). Then follows this allegation:

> "Thirty-second: On information and belief, by reason of the foregoing facts, Homer S. Cummings, Attorney General of the United States, in his official capacity as Alien Property Custodian, and each and every officer holding said position as Alien Property Custodian from July 12, 1918, up to and including the present time, and the Treasurer of the United States in office on July 12, 1918, and each and every Treasurer of the United States since that date (including the Treasurer of the United States at the present time), must be deemed in justice and truth to have had on hand as the property belonging to the complainant the sum of $3,887.84 and interest thereon from July 12, 1918" (R. 11).

The respondents made a motion to dismiss on the ground of lack of jurisdiction (R. 12), and this motion was granted (R. 13); the opinion of Circuit Judge Julian W. Mack (10 Fed. Supp. 343; R. 13-15), stating that on the facts stated in the bill of complaint the court had no jurisdiction, because he construed Section 9 (a) of the Trading With the Enemy Act to allow the recovery only of moneys *actually*

and physically and not constructively held by the Alien Property Custodian or the Treasurer of the United States *at the time of bringing suit.* Judge Mack said:

> "It seems to me clear that Section 9a, properly interpreted, was intended to give the person whose property had been wrongfully seized and sold, a remedy against the Government only for such property or money as at the time of the commencement of the suit is actually in the possession of the Alien Property Custodian or the Treasurer of the United States, and, as decided in *Henkels* v. *Sutherland,* 271 U. S. 298 (1925), any income therefrom actually received by the Government. It is not designed to charge the Government with liability for torts whether by the Alien Property Custodian or otherwise, and whether intentional or through a misconstruction of the law by such official" (R. 15).

He further said:

> "The exact question does not appear to have been decided in any of the cases that have been cited" (R. 14).

The last sentence of the opinion was—

> "The bill will be dismissed for want of jurisdiction" (R. 15).

The Circuit Court of Appeals adopted the opinion of Judge Mack (75 Fed. 2d 1005; R. 18).

Assignments of Error.

In the Circuit Court of Appeals the petitioner specified five assignments of error (R. 17), which bring up all of the questions covered by the argument, and need not be repeated here.

ARGUMENT.

POINT I.

Section 9 (*a*) of the Trading With the Enemy Act, and the Fifth Amendment, require full and not partial return of an American's property, or its proceeds, when it was mistakenly seized and sold by the Alien Property Custodian.

It may be of assistance to the Court to consider this Point, under the following sub-heads:

(a) The purpose of the Trading With the Enemy Act.

(b) Section 9 (a) of the Act was intended to give protection to all persons who were not enemy aliens.

(c) Section 9 (a) of the Act should receive a liberal construction.

(d) The mistaken or unwarranted interference with an American's property should be measured by the rules applicable to trustees and trust estates.

(e) Where an American's property has been taken, even in times of war, by Government officials, there is an implied agreement, required by the Fifth Amendment, that the citizen should be compensated for the reasonable value of the property taken, as of the time of the taking.

(*a*) The purpose of the Trading With the Enemy Act.

When the World War broke out it was realized by Congress that many Germans were conducting business in the United States, either individually or through partnerships,

or through American-formed corporations whose stock was owned by Germans. It was realized that the successful prosecution of the war required the temporary seizure of all such German-owned property or stock; and accordingly the Trading With the Enemy statute was enacted. Congress realized that in many instances it would be difficult and time wasting to determine whether the property or the stock was in fact enemy-owned, so the statute provided that the Alien Property Custodian, charged with the administration of the new Act, was entitled to immediate temporary possession of the property or stock in every instance, without judicial interference, leaving it to the Courts to decree the giving back of property or stock when improperly or mistakenly seized because belonging to Americans or friendly aliens. Section 9 (a) was placed in the statute, allowing claims to be made for the return of property, or, if sold, the proceeds of property, claimed to belong to Americans or friendly aliens, and a judicial review in equity in a Federal Court. This section was held in the first cases that reached this Court to be sufficient to make the entire Act constitutional, and not violative of the Fifth Amendment.

Central Union Trust Co. v. *Garvan,* 254 U. S. 554;
Stoehr v. *Wallace,* 255 U. S. 239;
Commercial Trust Co. v. *Miller,* 262 U. S. 51.

In *Central Union Trust Co.* v. *Garvan,* 254 U. S. 554, 569, Mr. Justice Holmes held the Act gave the Custodian the preliminary custody of the property or authorized its direct seizure

> "to make sure that it is forthcoming if finally condemned and does no more."

He said that Sections 9 and 7 of the Act presumed that property would be held by the Custodian until after the claim for its return was decided. At page 566 Mr. Justice Holmes stated:

> "There can be no doubt that Congress has power to provide for an immediate seizure in war times of property supposed to belong to the enemy, as it could provide for an attachment or distraint, if adequate provision is made for a return in case of mistake."

At page 568 he said that Section 9 of the Act implied that mistakes might be made.

In *Stoehr* v. *Wallace*, 255 U. S. 239, the Trading With the Enemy Act was held constitutional on account of the presence of Section 9. Mr. Justice Van Devanter said (at p. 245):

> "That Congress in time of war may authorize and provide for the seizure and sequestration through executive channels of property believed to be enemy-owned, if adequate provision be made for a return in case of mistake, is not debatable. *Central Union Trust Co.* v. *Garvan, supra.*"

He also said, at page 246:

> "Thus there is provision for the return of property mistakenly sequestrated; and we have no hesitation in pronouncing it adequate, for it enables the claimants *as of right* to obtain a full hearing on his claim in a court *having power to enforce it if found meritorious.*" (Italics ours.)

(b) Section 9 (a) of the Act was intended to give protection to all persons who were not enemy aliens.

There is a great distinction in the Act, as interpreted by this Court, between property belonging to enemy aliens, on the one hand, and that owned by American citizens or friendly aliens, on the other. In *Woodson* v. *Deutsche Gold*, 292 U. S. 449, Mr. Justice Butler, writing for this Court, held that there was no constitutional objection to the seizure of property or stock of enemy aliens, and the indefinite holding of them until such time as Congress should decide upon their disposition.

Moreover, it was held that Congress in enacting its Independent Offices Appropriation Act, passed March 28, 1934, had withdrawn its consent for former enemy aliens to file any claim or suit against the Alien Property Custodian, or Treasurer of the United States, such suits being in effect brought against the United States.

Banco Mexicano v. *Deutsche Bank*, 263 U. S. 591;
Miller v. *Robertson*, 266 U. S. 243, 257.
Synthetic Patents Co. v. *Sutherland*, 22 Fed. 2d 491; C. D. 276 U. S. 630.

A far different rule is applicable to the claims of American citizens, when their property was mistakenly or wrongfully seized by the Alien Property Custodian. In such case the decisions have been uniform, that Congress did not, and could not, authorize the appropriation of an American's property without due compensation, and that Section 9 was intended to give full relief by the return of all of the property seized; or its proceeds, in the case of sale.

Behn, Meyer & Co. v. *Miller*, 266 U. S. 457;
Henkels v. *Sutherland*, 271 U. S. 298;
Great Northern Railroad v. *Sutherland*, 273 U. S. 182, 194;
Escher v. *Woods*, 281 U. S. 379;
Vowinckel v. *Sutherland*, 24 Fed. 2d 196; C. C. A. 9;
Sielken-Schwarz v. *American Factors*, 60 Fed. 2d 43; C. C. A. 2; C. D. 287 U. S. 654.

In *Behn, Meyer & Co.* v. *Miller*, 266 U. S. 457, Mr. Justice McReynolds referred to the constitutionality of the Act, and the provisions of Section 9, as giving full relief in case of a mistake; and held that the mere fact that some of the stockholders of the corporation may have been enemy aliens, was no warrant for the Custodian seizing the entire property of the corporation, which had been formed under the laws of a British Colony. This Court accordingly reversed the dismissal by the District of Columbia courts in a suit brought by the corporation for the return of its property.

In *Henkels* v. *Sutherland*, 271 U. S. 298, the main question presented to this Court was the right of an American citizen to receive interest on bonds of the United States Government, where the American's property had been seized and sold, and the proceeds invested in these bonds. The case involved a large amount of money, and at first there was dispute over what was the principal amount which should be returned to Henkels on account of the mistaken seizure of his 2,298 shares of common stock of International Textile, Inc., which had been seized as enemy-owned, and sold, and the proceeds deposited in the United States Treasury. It appears in that record that on July 6,

1921, Judge Hough, in the District Court in New York, had determined that the stock belonged to Henkels, who was an American citizen and a resident of New York City and State, and the Treasurer of the United States was directed to account for and pay over to Henkels

> "the proceeds of the sale of the said 2,298 shares of common stock of International Textile, Inc." (R. 22).

The affidavit of the counsel for Henkels (R. 16) stated that the seizure of the stock had been wrongful; and then said:

> "regardless of the deduction of the expenses of sale and costs of administration (*which we were willing to waive*), complainant was entitled by the terms of the decree itself to an accounting for any income or interest earned on the principal." (Italics ours.)

At page 19 of the record it appears that the expenses of the sale, whose gross proceeds were over a million and a half dollars, were less than $13,000, and that there was a further charge of $2,500; and there was no claim for the return of these comparatively small amounts, and the amount of the principal to be returned to Henkels after crediting payments on account was agreed upon by counsel to be $873,776.28.

In this Court counsel for Henkels argued that the Fifth Amendment forbade the taking of Henkels's property, and that Section 9 of the Trading With the Enemy Act was intended to give full relief. The Solicitor General, in attempting to answer this argument, said in his brief:

> "It is further asserted that unless interest is paid by the United States upon the present claim the Fifth Amendment of the Constitution is being vio-

lated in that just compensation for the taking is not being fully made. This argument is manifestly fallacious. The United States did not take the property of the plaintiff under any theory of condemnation. It was taken as a war measure under the mistaken belief that it was the property of an enemy. The taking by the United States was under a claim of right, adverse to the owner, *and tortious.* If a statute is not present to permit the taking in condemnation proceedings by the United States the act of taking becomes *merely a trespass by the individual* who assumed to act for the United States." (Italics ours.)

It will be noted that this is the same argument adopted by Judge Mack in his opinion in this case (R. 15).

Mr. Justice Sutherland said (at p. 300):

> "No question is made in respect of the right of the Custodian to seize property supposed to belong to an enemy, although it may subsequently turn out to have been a mistake, adequate provision having been made for a return in that case."

Mr. Justice Sutherland later said (p. 301):

> "By the clear import of the statute, claimant's rights in respect of such proceeds are not inferior to his rights in respect of the original property,
>
> * * * * * * *
>
> "With enemy-owned property seized by the Custodian, it has been held, the United States may deal as it sees fit, *White* v. *Mechanics' Securities Corporation,* 269 U. S. 283; but it has no such latitude in respect of the property of an American citizen. Whether the government shall pay interest upon its obligations depends upon congressional assent; but

> it cannot confiscate the actual increment of property belonging to a citizen, or the increment of the proceeds into which such property has been converted, any more than it can confiscate the property or its proceeds, without coming into conflict with the Constitution."

The opinion then took up the argument of the Government that the case of *Angarica* v. *Bayard*, 127 U. S. 251, forbade the Government paying anyone interest on its own bonds when the Government retained possession of the bonds. This Court questioned the general application of such rule; and Mr. Justice Sutherland then said (p. 302):

> "Especially, it cannot be accepted as applicable here, where the property of a citizen has been mistakenly seized, and, by executive authority, after conversion into money, has been invested in government securities. We cannot bring ourselves to agree that a direction to invest such money in securities of the United States, rather than in other securities, may be utilized to enable the government unjustly to enrich itself at the expense of its citizens, by appropriating income actually earned and received, which morally and equitably belongs to them as plainly as though they had themselves made the investment."

In *Great Northern Railway Co.* v. *Sutherland*, 273 U. S. 182, Mr. Justice Brandeis said (at p. 194), referring to the Trading With the Enemy Act:

> "Protection to the rights of owners other than enemies was provided for by Section 9."

In *Escher* v. *Woods*, 281 U. S. 379, plaintiff, Sigg-Fehr, was a Swiss citizen, and stock owned by him in an Ameri-

can corporation had been seized; but the Court, upon his making claim for the proceeds, ordered the money returned to him. It was returned after deducting $55,909.83 for alleged administration expenses, the amount being exactly two per cent. of the principal amount involved. An order to show cause was then obtained why the $55,909.83 should not also be returned; while the suit was pending Sigg-Fehr died, and Escher, his administrator, was substituted as plaintiff. The Court of Appeals, reversing the Supreme Court of the District of Columbia, held that while a mistake had been made in seizing the property, the seizure was not so unfair and unreasonable as to fall within the condemnation of equity, and to be arbitrary or fraudulent (*Tate* v. *Escher,* 33 Fed. 2d 556). That Court stated that Section 24 provided for the payment from funds in the Custodian's hands of charges for collection and protection of the property, and that these charges were reasonable under the general rules of administration of trusts (33 Fed. 2d 556, 559). This Court reversed, Mr. Justice Holmes writing the opinion. He referred to the provisions of the Trading With the Enemy Act, particularly Sections 9 and 24; and said (at p. 384):

> "It will be observed that the charge for the expenses of the office is upon interest and collections only; that is, a deduction from income for the cost of earning it, not as in the present case, *a charge upon the corpus of the fund.*" (Italics ours.)

And then said (p. 384):

> "But, and this is the main thing, all of these provisions naturally are interpreted to refer to property that the Custodian *is entitled to hold.* It would be extraordinary if the charges incident to a seizure

> that the law did not intend the Custodian to make and a possession that the law requires him to surrender, were to be imposed upon the owner *whose interests were sacrificed up to the moment of restitution.* It seems to be going far enough to require him to bear the loss that he has suffered, without compelling him to pay the Government for its outlay in doing him harm. See *Hobbs* v. *McLean,* 117 U. S. 567." (Italics ours.)

The Solicitor General may possibly urge that the language just quoted was dictum, in that the only actual point litigated was whether an arbitrary deduction of two per cent. could be made without proof that this was a fair approximation of the cost of the administration and care of the property. An examination of the brief of *Escher* in this Court, however, shows that the case was argued on the broad general grounds referred to in Mr. Justice Holmes's opinion, to wit: that it was improper and unconstitutional to confiscate any part of the principal of the property of an American citizen or a friendly alien. No claim was made by Escher's brief that a "collection" charge of about $1,000 and a large amount for income taxes were not proper charges.

In *Vowinckel* v. *Sutherland,* 24 Fed. 2d 196; C. C. A. 9, Dr. Vowinckel, the complainant, was born in Germany, but had long been a resident of California, where he practised medicine; and he brought suit to get back his property, which had been seized by the Alien Property Custodian. It seems that he had applied for citizenship papers, but before they could be granted had volunteered for Red Cross duty with the German army. He was held entitled to a return of his property on the ground that he was not an enemy alien (10 Fed. 2d 19; 15 Fed. 2d 872). The

Alien Property Custodian then returned all of his property but $759.09, which the Government claimed had been spent, made up as follows:

(a) Trip of Assistant Attorney General to California from Washington to argue case in Circuit Court of Appeals.....	$617.99
(b) Government Printing Office, for appeal printing	94.90
(c) Department of Justice expenses.....	46.20
	$759.09

The District Court denied relief, but the Circuit Court of Appeals reversed, and ordered the return of the $759.09.

The Government brief before the Circuit Court of Appeals argued, as was contended in the courts below in this case, that the suit against the Alien Property Custodian under Section 9 was in reality a suit against the United States, that the $759.09 *had been spent, and the Government did not have it* (Brief, p. 3), and that the Act provided that recovery could be had only for what the Alien Property Custodian *held at the time of bringing suit.* These contentions of the Government were not followed by the Circuit Court of Appeals, which considered Sections 9 and 24 of the Act, and held that the remedy of an American whose property was seized was to be full, complete and adequate; and the court held that the particular expenses were not proper, as they were not incurred in protecting or administering the trust. The Court said (at p. 198):

> "If the Custodian is authorized to make the deductions here complained of, the remedy of the injured party is not complete and adequate. An in-

> nocent party is deprived of the use of his property by the acts of the government until the termination of a suit to recover it, and to then deduct the expenses incurred by the Department of Justice in an unsuccessful defense against the claim would work a grave injustice, such as Congress never intended. Nor is this a just and reasonable construction of the statute."

In *Sielken-Schwarz* v. *American Factors,* 60 Fed. 2d 43; C. C. A. 2; C. D. 287 U. S. 654, the question was as to the right of the Alien Property Custodian to vote whether a conveyance of property of the corporation should be made. The conveyance required the unanimous consent of all the stockholders, the Alien Property Custodian having improperly seized the stock of the complainant as enemy-owned. It was held that he had a right to vote; but Judge Learned Hand said (at p. 44):

> "The argument is that as the seizure was wrongful, it could confer no such power; that the Trading With the Enemy Act (50 U. S. C. A. Appendix, Sec. 1, *et seq.*) did not authorize the sale of non-enemy property, and it would not have been constitutional if it had. We may take it so. The power to seize, granted by section 7 (c) of the act (50 U. S. C. A. Appendix Sec. 7 (c), and note), was merely to gain possession, and for this reason the issue whether the property was enemy held, could be taken from the courts, and left with the Custodian. *Central Union Trust Co.* v. *Garvan,* 254 U. S. 554; *Commercial Trust Co.* v. *Miller,* 262 U. S. 51."

And again he said (p. 45):

> "As to its validity, it is not necessary to say whether Congress could have authorized the sale of

a citizen's property, merely by giving him a claim to the proceeds. That might be too far to go merely to avoid difficulties of administration; though even this is perhaps not wholly free from doubt, for much may be done, which is in fact in excess of a power, if it be essential to its effective exercise. At any rate we assume the issue arguendo with the plaintiffs. Congress made no such effort; it provided a complete remedy to the citizen whose property had been wrongly seized. He must surrender possession to be sure, but under section 9 of the act (50 U. S. C. A. Appendix Sec. 9) he might at once file a notice with the Custodian reclaiming his property."

(c) Section 9 (a) of the Act should receive a liberal construction.

Behn, Meyer & Co. v. *Miller,* 266 U. S. 457;
Miller v. *Robertson,* 266 U. S. 243, 248.

In *Miller* v. *Robertson, supra,* this Court said (p. 248):

"The purpose of section 9 was to prevent or lessen losses and inconvenience liable to result to non-enemy persons. This provision is highly remedial and should be liberally construed to effect the purposes of Congress and to give remedy in all cases intended to be covered. *United States* v. *Anderson,* 9 Wall. 56, 65, 66; *United States* v. *Padelford,* 9 Wall. 531, 538. The just purpose of the section is not to be defeated by a narrow interpretation or by unnecessarily restricting the meaning of the word within technical limitations. *United States* v. *Freeman,* 3 How. 556, 565; *Danciger* v. *Cooley,* 248 U. S. 319, 326; *French* v. *Weeks,* 259 U. S. 326, 328."

(*d*) The mistaken or unwarranted interference with an American's property should be measured by the rules applicable to trustees and trust estates.

In *Commissioner of Internal Revenue* v. *Stearns,* 65 Fed. 2d 371; C. D. 290 U. S. 670, it was stated that the Alien Property Custodian had the powers of a common-law trustee, without beneficial interest in the property that was seized. Mr. Justice Holmes in *Escher* v. *Woods,* 281 U. S. 379 cited as authority the case of *Hobbs* v. *McLean,* 117 U. S. 567. In that case Hobbs was the assignee in bankruptcy of one Peck, a contractor for United States Government work, and he had brought suit in the Court of Claims. McLean was the administrator of Peck, and he urged that he was entitled to compensation, although instead of aiding the plaintiffs he had obstructed them in the Court of Claims litigation. The Court referred to the rule that all persons helping to create or preserve a fund might be entitled to compensation, under the rule of *Trustees* v. *Greenough,* 105 U. S. 527. The Court then said (p. 582):

> "But where one brings adversary proceedings to take the possession of trust property from those entitled to it, in order that he may distribute it to those who claim adversely, and fails in his purpose, it has never been held, in any case brought to our notice, that such person had any right to demand reimbursement of his expenses out of the trust fund, or contribution from those whose property he sought to misappropriate.
>
> "The circuit court was right in not compelling the plaintiffs to pay for services rendered and expenses incurred in a proceeding adversary to their interest, and carried on for the benefit of others."

Other cases which have referred to the rule are:

McCourt v. *Singers-Bigger*, 145 Fed. 103, 114; C. C. A. 8;
Gillespie v. *J. C. Piles & Co.*, 178 Fed. 886; C. C. A. 8.

In *Gillespie* v. *J. C. Piles Co.*, *supra*, Judge Sanborn said, at page 892:

> "There is a manifest injustice and inequity in taking out of a fund or property in the custody of a court compensation for the services of an attorney or for the service of any other party by means of which the fund or property has been taken or kept from its true owner. The latter ought not to be required to pay for services which have been a positive detriment to him. And courts of equity may not lawfully take out of a fund or property in its custody and pay compensation for the services of an attorney of a trustee or for the services of any other party by means of which the fund or property has been taken or detained from its equitable owner. *Hobbs* v. *McLean*, 117 U. S. 567, 581."

(e) Where an American's property has been taken, even in times of war, by Government officials, there is an implied agreement, required by the Fifth Amendment, that the citizen should be compensated for the reasonable value of the property taken, as of the time of the taking.

The Fifth Amendment, restraining Congress from interfering with the property rights of American citizens, and preventing the Government from confiscating such rights without just compensation, has been referred to in

many cases: some of them arising from conditions in the World War.

United States v. *Lynah*, 188 U. S. 445, 471;
Olson v. *United States*, 292 U. S. 246, 255;
Jacobs v. *United States*, 290 U. S. 13, 16;
Perry v. *United States*, 294 U. S. 330;
Brooks-Scanlon v. *United States*, 265 U. S. 106, 123;
Russian Volunteer Fleet v. *United States*, 282 U. S. 481;
Phelps v. *United States*, 274 U. S. 341, 344;
West v. *Chesapeake & Potomac Telephone Co.*, 55 S. C. 894;
Louisville Joint Stock Land Bank v. *Radford*, 55 S. C. 854, 869;
Railroad Retirement Board v. *Alton Railroad Co.*, 55 S. C. 758.

This Court in *Olson* v. *United States*, 292 U. S. 246, defined what compensation must be paid to a citizen of the United States, whose property was taken by the United States or Federal officer.

Mr. Justice Butler there said (p. 255):

> "He is entitled to be put in as good a position pecuniarily as if his property had not been taken. He must be made whole but is not entitled to more. It is the property and not the cost of it that is safeguarded by state and Federal Constitutions."

In *Lynch* v. *United States*, 292 U. S. 571, which dealt with the question of war risk insurance policies, Mr. Justice Brandeis stated (p. 579):

> "The Fifth Amendment commands that property be not taken without making just compensation."

In *Jacobs* v. *United States*, 290 U. S. 13, the United States Government erected a dam in Alabama, under the authority of an Act of Congress, and this dam was alleged to have increased the flow of water on a complainant's land. The amount of the damages was not seriousiy disputed, but the question arose as to the item of interest and the Circuit Court of Appeals held that the complainant was entitled to damages on the theory of implied contract only, and hence no interest could be allowed.

Mr. Chief Justice Hughes said (p. 16):

> "This ruling cannot be sustained. The suits were based on the right to recover just compensation for property taken by the United States for public use in the exercise of its power of eminent domain. That right was guaranteed by the Constitution. The fact that condemnation proceedings were not instituted and that the right was asserted in suits by the owners did not change the essential nature of the claim. The form of the remedy did not qualify the right. It rested upon the Fifth Amendment. Statutory recognition was not necessary. A promise to pay was not necessary. Such a promise was implied because of the duty to pay imposed by the amendment. The suits were thus founded upon the Constitution of the United States."

In *Russian Volunteer Fleet* v. *United States*, 282 U. S. 481, the Government took certain Russian ships during the late war; and the Russian corporation brought suit in the Court of Claims for compensation. The case was dismissed for want of jurisdiction (68 Ct. of Cl., 32), but this Court

reversed, holding that alien friends were entitled to the benefit and protection of the Fifth Amendment of the Federal Constitution.

In *Phelps* v. *United States*, 274 U. S. 341, 344, plaintiffs had a pier in New York harbor, which was taken by the Government during the war for use for war purposes. This Court held that adequate compensation had not been given by the Court of Claims (61 Ct. of Cl., p. 1044), and Mr. Justice Butler said (p. 344):

> "Plaintiffs' property was taken before its value was ascertained or paid. Judgment in 1926 for the value of the use of the property in 1918 and 1919, without more, is not sufficient to constitute just compensation. Section 177 does not prohibit the inclusion of the additional amount for which petitioner contends. It is not a claim for interest within the purpose or intention of that section. Acts of Congress are to be construed and applied in harmony with and not to thwart the purpose of the Constitution. The Government's obligation is to put the owners in as good position pecuniarily as if the use of their property had not been taken. They are entitled to have the full equivalent of the value of such use at the time of the taking paid contemporaneously with the taking. As such payment has not been made, petitioner is entitled to the additional amount claimed. *Seaboard Air Line Ry.* v. *United States, supra,* 304; *Brooks-Scanlon Corp.* v. *United States,* 265 U. S. 106, 123; *Liggett & Myers Tobacco Co.* v. *United States,* 274 U. S. 215."

It seems obvious that it is not just compensation to an American citizen or corporation when the Alien Property Custodian has wrongfully seized and sold his property, received $20,000 as the *net proceeds* of the sale, and then paid

out, without the American's consent, $3,887.84, almost one-fourth of such proceeds, for expenses that would have been wholly unnecessary, if the Alien Property Custodian has simply *held the stock without selling it* until some court could pass upon the question of the right to make the seizure and sale.

The complainant feels that Section 9 (a) was intended to give *complete* and not *partial* compensation, and that to hold that the Alien Property Custodian could in good or bad faith pay out a large part of an American's money to third persons; and then say that Section 9 (a) of the Trading With the Enemy Act only required him to return to the citizen what part of the American's property, great or small, *that he had left,* after the Alien Property Custodian had been *more generous than just* in paying out petitioner's money, would not be giving the American just compensation, and would be the clearest violation of the Fifth Amendment.

POINT II.

Section 9 (a) of the Trading With the Enemy Act must be construed so as to make it constitutional, and not in violation of the Fifth Amendment.

It is well settled that statutes—especially acts of Congress—must be construed wherever possible to prevent their being held unconstitutional. This is also true when a grave constitutional doubt would arise if a claimed interpretation of an Act of Congress were made; while if the

Act was interpreted otherwise, it would be admittedly constitutional.

Interstate Commerce Commission v. *Oregon, Washington R. & Nav. Co.*, 288 U. S. 14, 40;
United States v. *Shreveport Grain & Elevator Co.*, 287 U. S. 77, 83;
United States v. *Standard Brewery, Inc.*, 251 U. S. 210, 220;
Russian Volunteer Fleet v. *United States*, 282 U. S. 481, 492;
United States v. *LaFranca*, 282 U. S. 568, 574;
Blodgett v. *Holden*, 275 U. S. 142, 148;
Phelps v. *United States*, 274 U. S. 341, 344;
Richmond Screw & Anchor Co. v. *United States*, 275 U. S. 331, 346;
Sielcken-Schwarz v. *American Factors*, 60 Fed. 2d 43, 45; C. C. A. 2; C. D. 287 U. S. 654;
George Moore Ice Cream Co. v. *Rose*, 289 U. S. 373, 379;
Crowell v. *Benson*, 285 U. S. 22, 62.

Mr. Chief Justice Hughes in *Russian Volunteer Fleet* v. *United States*, 282 U. S. 481 (p. 492) said:

> "The Act of June 15, 1917, if read according to its terms, presents no difficulty. A condition should not be implied which, to say the least, would raise a grave question as to the constitutional validity of the act. *Federal Trade Commission* v. *American Tobacco Co.*, 264 U. S. 298, 307; *Missouri Pacific Railroad Co.* v. *Boone*, 270 U. S. 466, 471; *Blod-*

> *gett* v. *Holden*, 275 U. S. 142, 148; *Richmond Screw Anchor Co.* v. *United States*, 275 U. S. 331, 346; *Lucas* v. *Alexander*, 279 U. S. 573, 577."

If the statute is construed to give full relief where the American's property is improperly seized by giving him the full and fair value of his property, under the Fifth Amendment, there would be no question of its constitutionality.

It is certainly not just compensation to turn over to the American citizen *only a part* of the proceeds of the wrongful sale of his property. To construe the statute to permit the Alien Property Custodian to be more than generous to attorneys, accountants and others by paying out nearly one-quarter of the net proceeds which he received from the sale of an American's stock, is not putting the American citizen or corporation

> "in as good a position pecuniarily as if his property had not been taken." (*Olson* v. *United States*, 292 U. S. 246, 255.)

The Alien Property Custodian would have done his full duty if he had held the stock without selling it until some court could pass upon the question of the right to make the seizure and sale, especially when he knew that the petitioner claimed that the seizure was wrongful. If the statute is construed to require the complete restoration to the petitioner of all of the net proceeds of the sale of the principal of his property, then there can be no question of its constitutionality under the Fifth Amendment.

POINT III.

The construction placed upon the provisions of Section 9 (*a*) of the Trading With the Enemy Act by the courts below, is forced, unfair and inequitable.

The Circuit Court of Appeals of the Ninth Circuit, in *Vowinckel* v. *Sutherland,* 24 Fed. 2d 196, held that Congress never intended to deduct, as alleged expenses of the Alien Property Custodian, any part of the principal of an American's property, and did not adopt the contentions of the Attorney General that the statute allowed the return of only what was held at the time of bringing suit, and that the moneys in question had already been spent. The courts below, in *our* case, have construed Section 9 (a), and especially that part of the section which authorizes the court to order the payment to the claimant

> "of the money or other property so *held* by the Alien Property Custodian or by the Treasurer of the United States",

to mean that the American had a remedy

> "against the Government only for such property or money as at the time of the commencement of the suit is actually in the possession of the Alien Property Custodian or the Treasurer of the United States" (R. 15; 10 Fed. Supp. 343, 344).

Judge Mack's opinion makes the statute read as if Congress had inserted after the words

> "held by the Alien Property Custodian",

the further words, *not in the statute,*

> "at the very moment the suit was instituted."

There is no time limitation in the statute, Congress evidently realizing that claimants might not know the facts or their rights for a period of months or years. Congress evidently did not intend that there should be a *time race* between the American citizen and the Alien Property Custodian, so that if the Custodian should succeed by a few days or hours in selling the property before a claim was made or suit brought, all relief would be barred to the American citizen. The more natural construction of the Act is, that the word *"held"* meant *"held at any time"*, or which the Custodian "should have held", and that improper payments or improper disposition of the principal of the American's property would be no excuse or defense when the American sought to have his property or its proceeds restored to him.

The harsh interpretation of the statute adopted by the courts below (R. 15) would authorize the confiscation of an American's property or money by officials of the United States in the following cases:

(a) When money paid to a representative of the Alien Property office was stolen from him before it reached the Custodian.

(b) Where the representative was dishonest and stole the money himself, or lost it by speculating.

(c) Where the money was paid out for political advantage and to political favorites.

(d) Where, through neglect or favoritism or undue "generosity", padded bills for alleged expenses were approved and filed.

(e) Where wholly unauthorized payments were made.

(f) Where the money or property was converted by the Alien Property Custodian, directly by him or his agents, or through ostensible payments, to third persons.

Many other examples could be offered.

The Government may urge that Judge Mack's construction of the statute is proper in that:

(1) The expenses of the sale were deductible under Section 24 of the Act.

The *Escher* case (*Escher* v. *Woods*, 281 U. S. 379) stated that Section 24 applied only to deductions from income and not from principal, for administration expenses and those incurred in the care of the property. Here the "expenses" were not of this character and no expenses need have been incurred at all if the wrongful sale had not been made (R. 5).

(2) There is no relief given American citizens for torts of the Government or its officials, and that Section 9 (a) of the Act did not intend to change this rule.

That very argument was made by the Attorney General in *Henkels* v. *Sutherland*, 271 U. S. 298, but was not followed by this Court which gave relief to the claimant.

(3) That if the seizure was unconstitutional, still the United States Government cannot be sued without its consent, and that no express consent is given by Section 9 (a), where the American's money or property has been spent.

The case of *Woodson* v. *Deutsche Bank*, 292 U. S. 449, held that the consent of the Government to be sued by an enemy alien had been withdrawn, the inference being plain that the consent still existed when the suit was brought by an American citizen, for in the absence of express enactment a consent to be sued once given is presumed to continue (*Lynch* v. *United States*, 292 U. S. 571). Moreover, in all the cases where recovery has been had, the same argument could have been made by the Government; and the fact that it was not made, or if made was not successful, is most significant. (See also *Jacobs* v. *United States*, 290 U. S. 13.)

(4) That the act referred only to property physically held at the time of bringing suit and did not apply when the Government had spent the money and did not have it on hand even though the property *should have* been held.

This point is not new, but was expressly raised in the Government brief in *Vowinckel* case (*Vowinckel* v. *Sutherland*, 24 Fed. 2d 196), and was ignored in the opinion, which decided the case on the broad principles of justice.

The construction of Section 9 (a) of the Act, made by the courts below, is not the liberal one required by the authorities already referred to. The Act never has been harshly construed as against an American, and there is nothing in the statute or its amendments which would justify any different position now from that taken at any time since the Act was first enforced.

POINT IV.

The statute gives relief, notwithstanding former officials of the government violated the rights of the American citizen.

It may be argued, as it was in the courts below, that the present acting Alien Property Custodian, Mr. Cummings, and the present Treasurer, Mr. Julian, had nothing whatever to do with the alleged wrongful acts in selling and disposing of petitioner's property, and that, therefore, they cannot be sued under the proper interpretation of Section 9 (a) of the Trading With the Enemy Act.

Section 780 of the Judicial Code of the United States (28 U. S. C. A. Sec. 780) was held by this Court in *Fix* v. *Philadelphia Barge Co.*, 290 U. S. 530, to permit a cause of action against one official to be continued against the new official after the resignation or death of the first one.

It presupposes a continuity of liability for questioned action by governmental officials. In actions under the Trading With the Enemy Act, if the opposite rule were the case and the accident of death or resignation of one government official who had improperly dealt with the property of an American citizen would prevent all redress in a suit against the new official, a great injustice would result.

POINT V.

If relief is granted, petitioner is entitled to interest as well as to the return of its principal.

It was held in *Henkels* v. *Sutherland*, 271 U. S. 298, that an American claimant who recovered his property

under the Trading With the Enemy Act was entitled to have the value of his property as of the date of the taking; and that this was not strictly the recovery of interest under the rule forbidding interest to be awarded against the sovereign, but merely represented a measure of the amount to be added when the compensation was not made at once.

See also,

Brooks-Scanlon Corporation v. *United States*, 265 U. S. 106;
Phelps v. *United States*, 274 U. S. 341;
Jacobs v. *United States*, 290 U. S. 13.

If all interest were denied, the rights of the petitioner under the Fifth Amendment would be violated.

The decree dismissing this case for want of jurisdiction should be reversed; and there being no question of fact in the case, a decree should be made ordering the Alien Property Custodian and/or Treasurer of the United States to pay to the petitioner $3,887.84, with interest from February 20, 1919, the day of sale of petitioner's stock; or in any event, a new trial should be had.

Respectfully submitted,

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